In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-463

DOMINICK DiGIRLOMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 26, 1975, the United States District Court for the Western District of Missouri adjudged petitioner in civil contempt for refusing to testify before a federal grand jury, despite an order granting him immunity pursuant to 18 U.S.C. 6002.[1] The

[1] The order of contempt was stayed pending final disposition on appeal. The grand jury's term has now expired. The questions presented, however, remain alive, since the government intends to call petitioner before another grand jury. Cf. *Moore* v. *Ogilvie*, 394 U.S. 814; *Sosna* v. *Iowa*, 419 U.S. 393.

court of appeals affirmed (Pet. App. 15-19; 520 F. 2d 372).

The grand jury proceedings at which petitioner refused to testify were conducted by four Criminal Division attorneys assigned to the Kansas City Field Office of the Organized Crime and Racketeering Section of the Department of Justice. Before conducting the grand jury inquiry, each of these attorneys, as indicia of his authority to represent the United States in the Western District of Missouri, filed a letter of authorization and a copy of a duly executed oath of office with the clerk of the district court. Each letter stated that the attorney was "specially retained and appointed as a Special Attorney under the authority of the Department of Justice" and was "specifically authorized and directed" to conduct in the Western District of Missouri "any kind of legal proceedings, civil or criminal, including grand jury proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct." Three of the letters were signed by Henry E. Petersen, Assistant Attorney General, and the other by John C. Keeney, Acting Assistant Attorney General (Pet. App. 16-18).

1. Petitioner contends that he was not required to answer questions before the grand jury because the Organized Crime and Racketeering Section attorneys had not been "specifically directed" to conduct the grand jury inquiry as that phrase is used

in 28 U.S.C. 515(a).[2] In order to satisfy the statutory requirement, he argues, the letters of authorization must be limited to specific cases within a specific judicial district. The same contention was rejected by the court below in *United States* v. *Wrigley*, 520 F. 2d 362 (reproduced at Pet. App. 48-62), certiorari denied, November 17, 1975, No. 75-5284.[3] As the court of appeals in *Wrigley* correctly concluded (520 F. 2d at 368-369; Pet. App. 58-59, 60-61):

> The purported limitation to the Attorney General's powers is not contained in the statute and is contrary to the thrust of the statutory scheme. Congress has placed in the Attorney General the duty to conduct the criminal litigation of the United States. 28 U.S.C. § 516 * * *. His powers include the direction and supervision of the United States Attorneys and the appointment and removal of their assistants. 28 U.S.C. §§ 519, 542 and 543. The assertion that § 515 (a) contains a limitation on the powers of the Attorney General in preservation of the inde-

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[2] 28 U.S.C. 515(a) provides:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

[3] Two of the attorneys who conducted the grand jury proceedings here also conducted the proceedings involved in *Wrigley*.

> pendence of the United States Attorneys is, when placed in context, unpersuasive. * * * The statute is not a limitation but a grant of authority that makes the powers of the Attorney General coextensive with his duties. * * *
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> The purpose of § 515(a) is to aid the effective enforcement of the criminal laws, to center the responsibility therefor in the Attorney General, and to insure that the United States is represented by persons with authority. * * * All that was done in this case. [Footnote omitted.]

The only other court of appeals that has ruled on the question also concluded that letters of authorization nearly identical to those involved here satisfied the statute. See *In re Di Bella*, 518 F. 2d 955, 958 (C.A. 2); *In re Subpoena of Persico*, 522 F. 2d 41 (C.A. 2).[4]

2. Petitioner also contends that the Attorney General could not properly delegate to the Assistant Attorney General his statutory authority to assign Department of Justice attorneys to conduct grand

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[4] Although the opinion in *Persico* suggests that the statute contemplates that such authority should be given only when there is some reason to limit the role of the United States Attorney—a suggestion with which the court of appeals in *Wrigley* took issue (520 F. 2d at 368, n. 11; Pet. App. 58, n. 11)—there is no conflict requiring resolution by this Court, for the Second Circuit concluded that there was adequate reason for authorizing Criminal Division attorneys to conduct grand jury investigations of organized crime. Even under the Second Circuit's standard, therefore, the appointments in this case were valid.

jury inquiries. That contention was also rejected by the court below in *United States* v. *Agrusa*, 520 F. 2d 370 (reproduced at Pet. App. 63-66). As the court correctly stated in *Agrusa* (520 F. 2d at 372; Pet. App. 66):

> By regulation, the supervision of the Criminal Division of the Department of Justice has been delegated to the Assistant Attorney in charge of that division. 28 C.F.R. § 0.55. This delegation includes the power to "* * * designate attorneys to present evidence to grand juries * * *." 28 C.F.R. § 0.60. Nothing in 28 U.S.C. § 515(a) or its legislative history evidences a congressional intent to limit the delegation authority of the Attorney General under 28 U.S.C. § 510. The delegation here to Assistant Attorney General Henry C. Petersen and Acting Assistant Attorney General John C. Keeney was in all respects proper.

See also *In re Subpoena of Persico*, *supra*, 522 F. 2d at 66-67.

United States v. *Giordano*, 416 U.S. 505, is not to the contrary. The Court there held that the Attorney General could not properly delegate to his Executive Assistant his authority under 18 U.S.C. 2516(1) to authorize an application for a court order permitting the interception of wire communications. Unlike the situation here, however, "the matter of delegation is expressly addressed by § 2516 and the power of the Attorney General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General specially designated by the Attorney General'" (416 U.S. at 514). Nothing in the

language, purpose, or legislative history of 28 U.S.C. 515 imposes any limitation upon the Attorney General's authority under 28 U.S.C. 510 to "authoriz[e] the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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